IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 6, 2004 Session

WILLIAM THURMAN GREENLEE, ET AL. v. GEORGE HODGSON

Appeal from the Circuit Court for Jefferson County
No. 18,372-III Rex Henry Ogle, Judge

Filed March 1, 2004

No. E2003-00573-COA-R3-CV

This case was filed April 15, 1985 and non-suited October 30, 1986. It was re-filed June 23, 1987 and dismissed March 14, 2001 by Order which provided that the dismissal was "without prejudice." The case was re-filed January 30, 2002, and the defendant's motion for summary judgment was granted January 27, 2003. Judgment affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR. and D. MICHAEL SWINEY, JJ, joined.

Jack W. Piper, Jr., Knoxville, Tennessee, Attorney for Appellants, William Thurman Greenlee, Mary Jane Greenlee, Dan Allen Hill and Judy Hill.

Kenneth W. Ward, Knoxville, Tennessee, Attorney for Appellee, George Hodgson.

OPINION

I.

This tort action was initially filed April 15, 1985. It was voluntarily non-suited October 30, 1986, and re-filed June 23, 1987. It was dismissed for failure to prosecute on Marcy 14, 2001. The Order opined that the dismissal was "without prejudice to the re-filing of same." On January 30, 2002, the case was re-filed. The Defendant moved for summary judgment on the ground that the one (1) year statute of limitations, Tenn. Code Ann. § 28-3-104, barred the suit. Thereupon, the Plaintiffs filed a motion to amend on October 22, 2002, alleging that the Order of Dismissal of March 14, 2001 [the second dismissal] should be set aside, and that their complaint [the third action] "be construed as a filing in [the second case.]" The motion to amend was denied and the motion for summary judgment was granted. The Plaintiffs appeal the third dismissal of their action, the propriety of which is presented for review. We review the award of summary judgment *de novo* with

no presumption of correctness since the issue is one of law. ***Scott v. Ashland Healthcare Ctr. Inc.***, 49 S.W.3d 281 (Tenn. 2001).

II.

It is conceded that the alleged claims are governed by the one-year statute of limitations prescribed by Tennessee Code Annotated § 28-3-104, and that actions timely filed but dismissed for reason(s) not concluding the action may be re-filed in compliance with Tennessee Code Annotated § 28-1-105(a) commonly referred to as the Tennessee Saving Statute. It is well settled that the new action must be filed within one year after the dismissal of the initial action. ***Payne v. Matthews***, 633 S.W.2d 494 (Tenn. Ct. App. 1982). The Saving's Statute provides "[i]f the action is commenced within the time limited by a rule or statute of limitations, but the judgment or decree is rendered against the plaintiff upon any ground not concluding the plaintiff's right of action . . . the plaintiff, . . . may, from time to time, commence a new action within one (1) year after the reversal or arrest." In ***Balsinger v. Gass***, 379 S.W.2d 800 (Tenn. 1964) the Supreme Court held that actions must be brought within one year after the inconclusive dismissal of an action brought within the applicable statute of limitations. This clearly pronounced rule appears to imperil the Plaintiffs' action.

III.

The Plaintiffs, by their present counsel, recognize their legal posture. They argue that the Defendant should be equitably or judicially estopped from "asserting that the [complaint] should be dismissed since doing so would violate the language of the order upon which the Defendant relies in arguing that the order operated as a dismissal on the merits." We interpret this argument to mean that the Defendant should be estopped to assert the defense of the one-year statue of limitations, because of the language of the second order, *i.e.*, "without prejudice." According to an affidavit submitted by the Plaintiffs' first attorney, he and co-counsel's motion to withdraw from the case motivated the trial judge to dismiss the case "without prejudice." The order was approved by Plaintiffs' counsel and by counsel for the Defendant.

A.

If the Defendant is to be equitably estopped as urged by Plaintiffs, the latter must show, *inter alia*, that the Defendant's conduct was a false representation or concealment of material facts or conduct which was calculated to carry the impression that the facts are otherwise and inconsistent with those subsequently asserted. *See,* ***Consumer Credit Union v. Hite***, 801 S.W.2d 822 (Tenn. Ct. App. 1990). In the case at Bar, the Plaintiffs apparently were incalcitrant upon discovery, and were cited to court in a motion to compel or risk the dismissal of their action. An affidavit from one of the Plaintiffs recites that one of his attorneys, Mr. Ogle, advised him that the case would be dismissed but no prejudice would attach if any claim was re-filed in one year. This Plaintiff also deposed that he received a letter from co-counsel, Mr. Terry, enclosing a copy of a motion to withdraw and asking that the "Court allow 90 days within which I could obtain another attorney."

The Defendant clearly is not equitably estopped to plead the statute of limitations as a defense. The record shows no misrepresentation or concealment of material facts on his part. ***Consumer Credit****, supra.*

B.

Judicial estoppel precludes a party from asserting to his advantage an inconsistent position in another's action. *See,* ***Chance v. Gibson***, 99 S.W.3d 108 (Tenn. Ct. App. 2002). So far as the record reveals, all the Defendant did - by his counsel - was to approve the Order of Dismissal, which provided that it was without prejudice. The Plaintiffs' argue that the *Defendant* should have directed the court's attention to the fact that a dismissal could not be "without prejudice." Suffice to state that the *Defendant* cannot be onerated with such responsibility, and judicial estoppel is not applicable.

IV.

The Plaintiffs next argue that they are entitled to relief under Rule 60.02, Tenn. R. Civ. P., which provides:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud . . . misrepresentation, or other misconduct of an adverse party; . . . (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, . . . was entered . . .

The order which dismissed the second complaint was entered March 14, 2001. The Rule 60.02 Motion was filed nineteen (19) months later, and thus was beyond consideration. *See,* ***Watts v. Kroger Co.***, 102 S.W.3d 645 (Tenn. Ct. App. 2002); ***Holiday v. Shoney's South, Inc.***, 42 S.W.3d 90 (Tenn. Ct. App. 2000). Ignorance of the Rules of Civil Procedure does not justify relief. ***Kilby v. Sivley***, 745 S.W.2d 284 (Tenn. Ct. App. 1987).

The judgment is affirmed at the costs of the Appellants.

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WILLIAM H. INMAN, SENIOR JUDGE